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Supreme Court, U.S.
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NO. 95-820

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM 1995

CATHERINE BAKER KNOLL, *et al.*,
Petitioners

v.

ELIZABETH BLACKWELL HEALTH
CENTER FOR WOMEN, *et al.*,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for
the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The petitioners asked the Court to review this case because the issues it presents are important to the continued functioning of our federal system, and particularly of the myriad federal-state cooperative programs of which Medicaid is only one example. Whether, for example, the federal administrators of such programs should be able to override state laws by fiat, *see* Pet. at 17-21, is surely a question that deserves the Court's attention. In their brief in opposition, however, the respondents answer these concerns with a torrent of irrelevancies, half-truths and invective, whose very stridency underlines the merit of the petition. We reply here to some of their major errors.

1. The respondents first rely, as they have relied throughout this litigation, on *Roe v. Casey*, 623 F.2d 289 (3rd Cir. 1980), and similar cases, which hold that the States are required to fund those abortions for which federal funding is available under the Hyde Amendment. Br. in Opp. at 9, 12-13 (listing cases). While it is true, as we have already pointed out, that there is substantial unanimity among the lower federal courts on this issue, *see* Pet. at 10 n.6, it is also irrelevant.

All the members of the Court of Appeals agreed that the general principle for which *Roe v. Casey* and similar cases stand does not decide the specific question presented by this case. Pet. App. 20a-23a (majority opinion), 38a (Nygaard, J., dissenting). Neither *Roe v. Casey*, nor any of the other cases cited by respondents, considered the validity of reporting and certification procedures like Pennsylvania's; nor did they consider the troubling implications for federalism of too much judicial deference to informal administrative pronouncements--"deference run amok," as the dissenting judge called it. Pet. App. 37a (Nygaard, J., dissenting). These

are important and unresolved issues which are not even addressed, let alone answered, by the respondents' laundry list of cases.

2. The respondents next try to minimize the importance of the administrative law issues which this case presents: how to distinguish "legislative" rules from "interpretive" rules, and how much deference to pay them? *See* Pet. at 19-21. As we pointed out in our petition, *ibid*, not only is there confusion among the courts of appeals on these issues, but the issues themselves take on added importance in this case because of the context of federalism in which they arise.

The respondents, however, repeatedly say that "even the dissent below agreed [that] the Court of Appeals correctly determined that the HHS directive was an interpretive rule." Br. in Opp. at 10; *id.* at 15 (same). This is only half true, and wholly misleading. What the dissenting judge really said was

> I agree *reluctantly* that, under binding [Third C]ircuit precedent, the letters must be treated as interpretive rules. Were I unfettered by precedent, however, *I would conclude that the letters are "spurious rules," entitled to no weight whatsoever....*

Pet. App. 41a (Nygaard, J., dissenting) (emphasis added), Pet. App. 45a (same). The dissenting judge followed this with a lengthy analysis showing the disarray on this and related issues both within the Third Circuit and among the courts of appeals. Pet. App. 41a-57a. The respondents' assertion that "[t]he Commonwealth stands alone in its contention," Br. in Opp. at 15, is thus incorrect.

3. Finally, in an ugly descent into name-calling, the respondents accuse the petitioners of "playing fast and loose with the judicial system." Br. in Opp. at 25. According to the respondents, the petitioners first asked the courts below "to defer completely to the HHS directive," *ibid*, and then, after the courts had done just that, the petitioners changed their position. *Id.* at 26-27. This time, the respondents' contention is not even half true.

In fact, the petitioners have maintained a consistent position on the HHS letters: we have always agreed with HHS that the statute itself says nothing that forbids state reporting or certification requirements; and we have always resisted--and challenged the legitimacy of--HHS' attempts to impose extra-statutory restrictions on such requirements without formal rulemaking.[1] What is more, we consistently informed the courts below of this position; extracts from our brief to the Court of Appeals appear in the margin.[2] It is the

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[1]*See Casey v. Shalala*, No. 94-0390 (M.D. Pa., Nov. 28, 1994)[1994 U.S. Dist. LEXIS 20645](dismissing complaint on jurisdictional grounds), *aff'd mem. sub nom. Ridge v. Shalala*, 68 F.3d 457 (1995). The district court dismissed the action on the ground that Pennsylvania could challenge the HHS letters if and when HHS attempted to enforce them. But now, because of the injunction entered in this case, HHS will never need to enforce them; the respondents, via contempt proceedings, will do any enforcing that is needed. Pennsylvania thus will never have any opportunity to challenge these letters.

[2]In their brief to the Court of Appeals, the petitioners first discussed the manner in which the letters from HHS support their position, and then said:

> These two letters also purport to require that states establish procedures to waive any state imposed reporting requirements in certain circumstances. The [petitioners] contend that this mandated "waiver" is a substantive rule "in interpretive clothing", which must

respondents who are playing "fast and loose" here--with the truth.

4. The respondents' frantic efforts cannot obscure what happened in this case: the Court of Appeals, by extending an uncritical deference to the informal pronouncements of a federal administrator, has allowed that administrator to set aside an otherwise valid state law without the safeguards provided by the Administrative Procedures Act--that is, the administrator has been allowed to act without even having to *listen* to the concerns of affected parties. The Court should review this troubling decision.

> be promulgated pursuant to the Administrative Procedures Act.... [T]he [petitioners] have challenged HHS's "waiver" requirement ... in a [separate] federal court action.

Br. for Appellants at 9 n.4 (citations omitted). And again:

> Pennsylvania is currently engaged in litigation against HHS over that agency's position that rape and incest reporting requirements, while permissible in themselves, must be waived under certain circumstances. Pennsylvania has challenged this "waiver" requirement as a rule promulgated in violation of the Administrative Procedures Act.

Br. for Appellants at 16 n.9.

Respectfully submitted,

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